

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL L LUCKERT,  
Plaintiff,  
  
v.  
  
O. SMITH, et al.,  
Defendants.

Case No. [19-cv-08204-PJH](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 70

Plaintiff, a former county detainee, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. He alleges that at the public library, Patrol Officer Ochoa and Deputies Smith, Gutierrez, Brule and Espiritu used excessive force in arresting him, and Gutierrez and Deputy Mendoza used excessive force while placing him in a cell at the county jail.<sup>1</sup> Defendants filed a motion for summary judgment on the merits. Docket No. 70. Plaintiff filed an opposition (Docket Nos. 77, 81, 85) and defendants filed a reply (Docket No. 87). For the reasons set forth below, the motion for summary judgment is granted in part and denied in part.

**MOTION FOR SUMMARY JUDGMENT**

**Legal Standard**

Summary judgment is proper where the pleadings, discovery and affidavits show that there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

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<sup>1</sup> The court does not address claims raised for the first time in the opposition to summary judgment or that were already dismissed.

(1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the moving party has met this burden of production, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a genuine issue for trial. *Id.* If the nonmoving party fails to produce enough evidence to show a genuine issue of material fact, the moving party wins. *Id.*

### **Facts**

A review of the record indicates that the following facts are undisputed unless otherwise noted:

On February 26, 2019, at approximately 4:15 p.m., defendant Library Patrol Officer Ochoa was on duty at the San Francisco Main Library and received a call that a library staff member had been physically assaulted on the sixth floor. Motion for Summary Judgment (“MSJ”) Ochoa Decl. ¶ 3. Ochoa responded to the sixth floor, and library staff identified plaintiff as the assailant, who was still in the area. *Id.* at ¶ 4. Ochoa approached plaintiff, who was visibly agitated and acting erratically and took up an aggressive stance. *Id.* at ¶¶ 4, 5. Ochoa kept his distance and attempted to speak with plaintiff about the assault. *Id.* at ¶ 5.

After attempting to speak with plaintiff, Ochoa radioed for assistance to the San Francisco deputy sheriffs who were assigned to the library. *Id.* Defendant Deputy Smith, who was in uniform, arrived, identified himself as a sheriff’s deputy and tried to speak with plaintiff. Smith Decl. ¶¶ 3-5. Smith observed that plaintiff was still visibly agitated. *Id.* at ¶ 4.

After trying to speak with plaintiff, Smith, with Ochoa’s assistance, handcuffed plaintiff for everyone’s safety as they continued to investigate. Smith Decl. ¶ 5; Ochoa

1 Decl. ¶¶ 6-7. Smith and Ochoa applied only enough pressure to maintain control of  
2 plaintiff, who was pulling away and flailing his arms. Smith Decl. ¶ 5; Ochoa Decl. ¶ 7.  
3 Once plaintiff was handcuffed, Smith told plaintiff that he was under arrest for willfully  
4 resisting, delaying or obstructing a peace officer. Smith Decl. ¶ 5. The handcuffing by  
5 Smith and Ochoa did not cause plaintiff any pain. MSJ, Wang Decl. Ex. A, Luckert  
6 Deposition at 61.

7 Smith then escorted plaintiff from the sixth floor to the security office on the first  
8 floor. *Id.* at ¶ 6. Smith kept his hands on plaintiff but only applied enough pressure to be  
9 able to detect any resistance and maintain control because plaintiff was verbally hostile  
10 and aggressive. *Id.* Smith radioed his partner, defendant Deputy Gutierrez, and  
11 informed him about the incident and asked him to meet him at the security office. *Id.*  
12 Defendant Deputies Brule and Espiritu were nearby and responded to the library. Brule  
13 Decl. ¶ 2.

14 Gutierrez, Brule and Espiritu met Smith, Ochoa and plaintiff at the security office.  
15 Brule Decl. ¶ 3; Gutierrez Decl. ¶ 3. Prior to searching plaintiff, Gutierrez asked him if he  
16 had anything on his person that could harm Gutierrez. Gutierrez Decl. ¶ 4. Plaintiff did  
17 not respond but was verbally hostile and aggressive. *Id.* Gutierrez applied a bent wrist-  
18 lock on plaintiff with one hand and pat searched with the other. *Id.* ¶ 5 Gutierrez applied  
19 minimal pressure and found a knife concealed in plaintiff's pocket. *Id.* at ¶¶ 4-5. Nobody  
20 made any physical contact with plaintiff in the security office other than when Gutierrez  
21 searched him. *Id.* at ¶ 5; Smith Decl. ¶ 7; Espiritu Decl. ¶ 3; Brule Decl. ¶ 3; Ochoa Decl.  
22 ¶ 9.

23 Plaintiff disputes Gutierrez's statements and contends that he was not resisting  
24 when Gutierrez bent his wrist backwards causing extreme pain and injuries. MSJ, Wang  
25 Decl. Ex. A, Luckert Deposition at 61; Docket No. 77 at 7, 10.

26 Gutierrez, Espiritu and Brule escorted plaintiff to the transport van outside of the  
27 library and secured him in the back. Gutierrez Decl. ¶ 6; Brule Decl. ¶ 4. Gutierrez had  
28 one hand on plaintiff's shoulder and the other on his elbow, but he did not use any force.

1 Gutierrez Decl. ¶ 6. Brule and Espiritu did not make any physical contact with plaintiff  
2 during his escort to the van. MSJ, Wang Decl. Ex. A, Luckert Deposition at 81.

3 Defendant Deputy Mendoza arrived and drove plaintiff to San Francisco County  
4 Jail with Gutierrez. Gutierrez Decl. ¶ 7; Mendoza Decl. ¶ 3. At the jail, Gutierrez again  
5 searched plaintiff by applying a rear wrist-lock on plaintiff with minimal pressure.  
6 Gutierrez Decl. ¶ 9.

7 During the booking process at the jail, plaintiff refused to answer questions from  
8 Jail Medical Services, including refusing to answer whether he was suicidal. Gutierrez  
9 Decl. ¶ 10. Plaintiff disputes this and states that no one identified themselves as medical  
10 professionals to treat his injuries. Docket No. 77 at 4. At times during the booking  
11 process, Mendoza applied a control-hold to gain plaintiff's compliance with fingerprinting,  
12 photographing and medical triage. Mendoza Decl. ¶ 5. Minimal pressure was applied.  
13 *Id.*

14 Plaintiff was then placed in a safety cell for being combative and presenting an  
15 imminent danger to himself and others. *Id.* at ¶ 6. Mendoza placed plaintiff in the safety  
16 cell by placing his hands on plaintiff's shoulder and wrist, applying only enough pressure  
17 to maintain control and detect any resistance. *Id.* Plaintiff was ordered to his stomach so  
18 that his handcuffs could be removed, and his clothes were removed because he had  
19 soiled them. *Id.*; Gutierrez Decl. ¶ 12. Other deputies removed plaintiff's handcuffs and  
20 clothes while Mendoza held plaintiff's shoulder and arms using only enough pressure to  
21 detect any resistance and keep plaintiff from rolling over. Mendoza Decl. ¶ 6. Gutierrez  
22 states he did not make physical contact with plaintiff while in the safety cell. Gutierrez  
23 Decl. ¶ 11.

24 Plaintiff disputes this and states that he was not resisting. According to plaintiff,  
25 Gutierrez was making contact with him in the cell, bending back his wrist, hand and  
26 fingers, causing extreme pain and injuries. Docket No. 77 at 7, 10. Medical reports  
27 indicated swelling and a punctate hyperdensity in the distal left thumb and excoriations  
28 on the fingers but no fractures. *Id.* at 30, 34.

## ANALYSIS

### Legal Standard

An allegation of the use of excessive force by a law enforcement officer in effectuating an arrest states a valid claim under 42 U.S.C. § 1983. *See Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986), *overruled on other grounds by Graham v. Connor*, 490 U.S. 386 (1989); *see also Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 641-42 (9th Cir. 2018) (pro se allegations that police officers “beat the crap out of” plaintiff and caused him severe injury enough to support a legally cognizable claim under § 1983). Excessive force claims which arise in the context of an arrest or investigatory stop of a free citizen are analyzed under the Fourth Amendment reasonableness standard. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

“To determine whether officers used excessive force during an arrest, courts balance ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.’” *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010) (quoting *Graham*, 490 U.S. at 396). In the Ninth Circuit, evaluation of an excessive force claim under *Graham* involves three steps: (1) assessment of the severity of the intrusion on Fourth Amendment rights by evaluating the type and amount of force used; (2) evaluation of the government’s interest in the use of force; and (3) balancing the gravity of the intrusion on the individual with the government’s need for the intrusion. *Glenn v. Washington Cnty*, 673 F.3d 864, 872 (9th Cir. 2011). “The operative question in excessive force cases is ‘whether the totality of the circumstances justifie[s] a particular sort of search or seizure.’” *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1542 (2017) (alteration in original) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Defendants met their burden in demonstrating the absence of a genuine issue of material fact with respect to the excessive force. The defendants submitted declarations attesting to the minimal force used and stating that it was reasonable in light of the circumstances. The issue remains if plaintiff has met his burden in presenting specific

1 facts showing that there is a genuine issue for trial.

2 Plaintiff's opposition filings mostly focus on his medical reports and generally state  
3 that he was not resisting and was subject to excessive force by defendants. He presents  
4 very few arguments regarding the actions of the individual defendants with respect to the  
5 legal standards above, and some of his allegations and evidence are contradictory;  
6 nevertheless, the court has liberally construed his filings in light of his status as a pro se  
7 formerly incarcerated party. See *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010)  
8 ("We have, therefore, held consistently that courts should construe liberally motion  
9 papers and pleadings filed by pro se inmates and should avoid applying summary  
10 judgment rules strictly."). However, while *Ponder* relieves pro se inmates from strict  
11 compliance with summary judgment rules, it does not entirely release them from any  
12 obligation to identify or submit at least some competent evidence in support of their claim.  
13 *Soto v. Sweetman*, 882 F.3d 865, 873 (9th Cir. 2018) (plaintiff not entitled to equitable  
14 tolling because he failed to allege in his complaint that he could not proceed with  
15 grievance process until after an investigation was completed; failed to submit any  
16 declaration, affidavit or other competent evidence in his opposition to summary judgment;  
17 and failed to raise the issue until responding to the district court's show cause order).  
18 Moreover, it is not the task of the district court to scour the record in search of a genuine  
19 issue of triable fact. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The  
20 nonmoving party has the burden of identifying with reasonable particularity the evidence  
21 that precludes summary judgment. *Id.* If the nonmoving party fails to do so, the district  
22 court may properly grant summary judgment in favor of the moving party. See *id.*; see,  
23 e.g., *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028-29 (9th Cir. 2001) (even if  
24 there is evidence in the court file which creates a genuine issue of material fact, a district  
25 court may grant summary judgment if the opposing papers do not include or conveniently  
26 refer to that evidence).

27 Plaintiff presents no evidence that Brule or Espiritu used any force against him.  
28 Ochoa's only use of force was in helping Smith handcuff plaintiff. It is undisputed that the

1 handcuffing did not cause him any pain. Summary judgment is granted for these  
2 defendants.

3 Other than general allegations, plaintiff presents no evidence that Smith or  
4 Mendoza used excessive force. Simply listing the defendants' names and stating that  
5 they used excessive force without providing any specific details regarding the type of  
6 force used and for which incident, is insufficient. Smith and Mendoza submitted  
7 declarations describing their various interactions with plaintiff and the amount of force  
8 they used, which they argued was minimal. Plaintiff fails to even attempt to present  
9 evidence in response. Summary judgment is granted for these defendants. The court  
10 notes that while plaintiff presented specific allegations against Mendoza in the operative  
11 amended complaint, he states that it was a mistake. Docket No. 77 at 9-10. Plaintiff  
12 states in the opposition that he confused Mendoza and Gutierrez and the allegations  
13 against each defendant should be switched. *Id.*

14 Plaintiff only presents specific allegations in his opposition to summary judgment  
15 regarding Gutierrez. He states that he was not resisting in the library security office when  
16 Gutierrez bent his wrist backwards, causing extreme pain and injuries. Similarly, plaintiff  
17 states that while in the county jail Gutierrez again bent his wrist as well as his hand and  
18 fingers, causing injuries that are demonstrated in his medical records. Plaintiff has met  
19 his burden in presenting specific facts showing that there is a genuine issue for trial for  
20 Gutierrez.

21 Unreasonable force claims are generally questions of fact for a jury. See  
22 *Headwaters Forest Defense v. Cnty. of Humboldt*, 240 F.3d at 1185, 1198 (9th Cir. 2000)  
23 *overruled on other grounds*; *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995) (citing  
24 *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). Although excessive force cases  
25 can be decided as a matter of law, they rarely are because the Fourth Amendment test  
26 for reasonableness is inherently fact-specific. See *Headwaters*, 240 F.3d at 1198; see,  
27 e.g., *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 605-06 (9th Cir. 2016) (although  
28 plaintiffs presented substantial evidence that force was unreasonable, judgment as a



1 matter of law inappropriate because defendants also presented substantial evidence to  
2 support their position; jury entitled to choose between both positions based on their  
3 weighing of the evidence and witnesses' credibility).

4 In this case there are disputed facts about the nature of the force used in bending  
5 plaintiff's wrist, hand and fingers and the injuries suffered by plaintiff; specifically, there is  
6 a contest between plaintiff's version of the facts and Gutierrez's explanation. If plaintiff's  
7 facts are true and Gutierrez forcefully bent plaintiff's wrist, hand and fingers on two  
8 separate occasions while plaintiff stated he was in pain and while plaintiff was not  
9 resisting, and this force caused plaintiff's injuries, then a jury could conclude there was a  
10 constitutional violation.

11 A jury could make the same conclusion if plaintiff was already handcuffed during  
12 the use of force against his wrist, hands and fingers. The Ninth Circuit has long  
13 recognized that abusive handcuffing, which involves the wrist, hands and fingers, may  
14 constitute a Fourth Amendment violation. *See, e.g., Palmer v. Sanderson*, 9 F.3d 1433,  
15 1436 (9th Cir.1993) (denying qualified immunity and holding that the "abusive application  
16 of handcuffs" causing pain and bruising was unconstitutional); *see also Luchtel v.*  
17 *Hagemann*, 623 F.3d 975, 989 (9th Cir. 2010) (Beezer, J., concurring in part and  
18 dissenting in part) (noting that "the right to be free from excessive force in handcuffing is  
19 clearly established in our precedent").

20 For all these reasons, summary judgment is denied for Gutierrez.

### 21 **Qualified Immunity**

22 The defense of qualified immunity protects "government officials . . . from liability  
23 for civil damages insofar as their conduct does not violate clearly established statutory or  
24 constitutional rights of which a reasonable person would have known." *Harlow v.*  
25 *Fitzgerald*, 457 U.S. 800, 818 (1982). The rule of "qualified immunity protects 'all but the  
26 plainly incompetent or those who knowingly violate the law.'" *Saucier v. Katz*, 533 U.S.  
27 194, 202 (2001) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Defendants can  
28 have a reasonable, but mistaken, belief about the facts or about what the law requires in



1 any given situation. *Id.* at 205. A court considering a claim of qualified immunity must  
2 determine whether the plaintiff has alleged the deprivation of an actual constitutional right  
3 and whether such right was clearly established, such that it would be clear to a  
4 reasonable officer that his conduct was unlawful in the situation he confronted. See  
5 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (overruling the sequence of the two-part  
6 test that required determining a deprivation first and then deciding whether such right was  
7 clearly established, as required by *Saucier*). The court may exercise its discretion in  
8 deciding which prong to address first, in light of the particular circumstances of each  
9 case. *Pearson*, 555 U.S. at 236.

10 The court already found that, looking at the evidence in the light most favorable to  
11 plaintiff, he states a claim of excessive force. Accordingly, the court proceeds to the next  
12 step, which requires the determination of whether, at the time of the incident, it would  
13 have been clear to a reasonable official that his conduct was unlawful in the situation he  
14 confronted. See *Saucier*, 533 U.S. at 201. In deciding this, the court must identify the  
15 “contours of the right” that plaintiff alleges defendant violated. The Supreme Court has  
16 made clear that the right an official is alleged to have violated must have been “clearly  
17 established in a particularized context.” *Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir.  
18 2012) (citing *Saucier*, 533 U.S. at 202).

19 As early as 1993, in *Palmer*, the Ninth Circuit rejected an officer’s contention that  
20 he was entitled to qualified immunity against a claim of tight handcuffs because the  
21 officer “has presented no evidence that would justify handcuffing [plaintiff] so tightly that  
22 he suffered pain and bruises, or to justify his refusal to loosen the handcuffs after  
23 [plaintiff] complained of the pain.” The Ninth Circuit held in that case: “no reasonable  
24 officer could believe that the abusive application of handcuffs was constitutional.” *Palmer*,  
25 9 F.3d at 1436.

26 Moreover, it has long been clearly established that the reasonableness of the  
27 amount of force applied during an arrest must be balanced against the need for force.  
28 See, e.g., *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001). When a suspect is

1 not actively resisting or attempting to evade arrest, does not pose any immediate threat  
2 to the safety of the officers or others, and is being arrested for a minor and nonviolent  
3 offense, it would have been clear to a reasonable officer that no need for force existed.  
4 *See, e.g., Bryan v. MacPherson*, 630 F.3d 805 828-29 (9th Cir. 2010) (arrest for a traffic  
5 infraction “militates against finding the force used to effect an arrest reasonable where  
6 the suspect was also nonviolent and posed no threat to the safety of the officers or  
7 others” (internal quotation marks omitted)).

8 Because it has been clearly established prior to this incident that the force used in  
9 this incident would have been excessive, Gutierrez is not entitled to qualified immunity.

#### 10 **REFERRAL TO PRO SE PRISONER MEDIATION PROGRAM**

11 This case appears to be a good candidate for the court’s mediation program.  
12 Good cause appearing therefore, this case is now referred to Magistrate Judge Illman for  
13 mediation or settlement proceedings pursuant to the Pro Se Prisoner Mediation Program.  
14 The proceedings will take place within 120 days of the date this order is filed. Magistrate  
15 Judge Illman will coordinate a time and date for mediation or settlement proceedings with  
16 all interested parties and/or their representatives and, within five days after the  
17 conclusion of the proceedings, file with the court a report for the prisoner mediation or  
18 settlement proceedings.

19 From time to time, prisoner-plaintiffs have refused to participate in mediation and  
20 settlement proceedings. Although the court assumes that will not occur in this case, the  
21 court wants to make clear the consequences if it does. Judicial resources are consumed  
22 preparing for mediation and settlement conferences, and those resources are wasted  
23 when a scheduled conference does not proceed. To avoid that happening, plaintiff is  
24 now specifically ordered to attend and participate in the mediation or settlement  
25 conference proceedings. He does not have to reach a settlement or other resolution of  
26 his claims, but he absolutely must attend and participate in all the mediation or settlement  
27 conference proceedings. The conference may be set up so that he will appear in person,  
28 by videoconference or by telephone—and he must attend whatever format Magistrate

1 Judge Illman chooses.

2 Plaintiff is cautioned that he may be sanctioned for failure to comply with an order  
3 to participate in a settlement conference, and such sanctions may include dismissal of  
4 part or all of the action. See Fed. R. Civ. P. 16(a), (f), and 41(b). Plaintiff must also  
5 timely respond to court orders.

6 **CONCLUSION**

7 1. For the reasons set forth above, defendants' motion for summary judgment  
8 (Docket No. 70) is **GRANTED IN PART AND DENIED IN PART**. All defendants are  
9 **DISMISSED** with prejudice except for Gutierrez.

10 2. This action is now referred to Magistrate Judge Illman for mediation or  
11 settlement proceedings pursuant to the Pro Se Prisoner Mediation Program. The clerk  
12 shall **SEND** a copy of this order to Magistrate Judge Illman. This case is **STAYED** until  
13 further order from the court.

14 **IT IS SO ORDERED.**

15 Dated: December 28, 2022

16  
17 /s/ Phyllis J. Hamilton

18 PHYLLIS J. HAMILTON  
19 United States District Judge  
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